

LP
F
5012

1859

C1

NOT CATALOGUED

Queen's University
Library

KINGSTON, ONTARIO

F5012
1859C1

THE CARDROSS CASE.

LORD JERVISWOODE'S DECISION.

ON Wednesday, November 21st, the Commission of the Free Church General Assembly met, Rev. Dr. Buchanan, Moderator.

Before proceeding to the special business, Dr. Begg called attention to the approaching commemoration of the first meeting of the General Assembly, on the 20th of December, and the importance of its universal observance. He urged the duty of expounding, on that day, both the duty of gratitude for the general blessings of the Reformation, at present menaced by the aggressions of Rome, and also the question at present at issue between this and all Free Churches and the Court of Session. He also urged the importance of making a liberal collection on that day in behalf of the Protestant Institute of Scotland, and thus adopting one effectual means of handing down our privileges to the generations to come. (Applause). *

This was unanimously agreed to.

THE CARDROSS CASE.

DR. BEITH next gave in the report on the Cardross Case.

DR. CANDLISH, in moving the adoption of the report, said,—Moderator, I rise to move the adoption of this report; that is to say, to ask the Commission to approve of the step which, acting on the advice of their counsel, the committee have resolved to take—namely, to reclaim against the decision of the Lord Ordinary to the Inner House. I hoped and expected that this motion would have been seconded by Principal Cunningham, but I regret to say that the Principal is detained by the severe and apparently mortal illness of a very near relative,

and cannot be amongst us to-day. I regret his absence for such a cause. And I regret it all the more because I relied on his making up for any deficiencies in the statement I am about to make, when he seconded the motion as he had agreed to do.

I must crave the indulgence of the Commission if I trespass at some length in bringing before them a statement of this case. It is the first time that I have opened my mouth on the subject since the sentences were passed in the General Assembly which have given occasion to these proceedings in the Civil Court. I have not said a word in public on the

* In the press. — THE REFORMATION, AND WHAT IT DID FOR SCOTLAND. A Tract for the 20th of December. (Four pages small 8vo, price 1s. per 100, 1s.2d. by post.) It has been proposed to distribute this Tract among Sabbath-school children and others, all over the country, on the 20th of December. Orders must be received by the Publishers not later than the 10th. T. NELSON AND SONS, Edinburgh.

subject since the meeting of the General Assembly in 1858. I suppose the Commission are aware that I stand in the position of having been personally a good deal held up before the community in connection with these sentences that have been carried into the Court of Session. I rather fear that some even of our own Church have a sort of impression that it was some extreme view of mine which I got the General Assembly of 1858 to give its consent to, that has been the cause of all this distraction and distress. If so, I can only say that I am here now to answer for all that was done by that General Assembly, although, after all, I really did nothing more than express the general mind of that Assembly. Still, for the reason I have stated, partly personal to myself, as well as on general grounds, I should like you to exercise a little patience if I trespass on the time of the Commission. (Applause.)

I wish first to clear away one or two prejudices on the part of some people that have got up in connection with this case. I shall mention only two of those prejudices, which it seems to me that all due pains should be taken to clear away. The first arises out of our being compelled to plead the case in the Civil Courts, not upon the merits of our sentences, but on the question of the competency of the Civil Courts to touch our sentences, whatever their merits might be. Obviously this implies that we must assert the doctrine that, let our proceedings be ever so irregular and ever so contrary to the Court of Session's views of justice, that Court has nothing to do with the sentences which we pronounced. Now, many people are apt to run away with the impression, that because we must put our case in that strong way, therefore we are to be considered as granting that our proceedings were irregular and unjust. That is a very foolish inference to draw. But I believe that a great deal of prejudice has been created upon that score. Because we say that the Court of Session—let our proceedings be ever so irregular and con-

trary to their views of rule, and order, and justice—have no business to touch our sentences, therefore we are held up as acknowledging that our proceedings were irregular and wrong. Now, it is very important at all events to keep before the minds of our members, and of our friends, that we stand by the proceedings of the General Assembly of 1858 in this case as perfectly regular; perfectly in accordance with the laws and constitution of this Church; and as being precisely such proceedings as this Church in any similar case might adopt, and probably would adopt. (Hear, hear.)

Thus, as to the first of our sentences: Somehow or other it seems to be taken for granted that, because we maintain the incompetency of the Civil Court to meddle with the sentence of suspension, even although we had gone wrong in settling the point that was then before us, therefore we were actually wrong in our way of dealing with that point. Now, I trust we will never come—that this Church will never come—to the conclusion that we were wrong in the proceedings which we then took in this case. I know that I speak at great disadvantage, because men learned in Church law have taken an opposite view. But, under the shelter of a man like Principal Cunningham, and others thoroughly acquainted with the laws and constitution of that Church, I do not hesitate to say that I would make precisely the same motion again that was then carried in 1858,—(cheers),—and I believe I would carry with me as large a majority as I then carried. (Hear, hear.) But it seems to have been quietly taken for granted in many places that we admit, somehow or other, the irregularity of our procedure in that case; nay, more than that, that we admit, somehow or other, that substantial justice was not done, and that we decided upon a matter that was not then before the General Assembly. Now, a question of form no doubt arose—it may have been a question of more than form—as regards our procedure; the question, namely, whether the particular count in the libel—the

count alleging a criminal assault on a married woman—was entirely before us for the purpose of our disposing of it, or whether the more serious offence involved in it had been finally disposed of in the inferior court. We debated that point, and, by a large majority, we carried that the whole counts in the libel were before us for judgment. Both the parties who hold that view, and those who held the contrary, must plainly admit that the whole evidence in the case was before us—(hear)—that the parties at the bar were heard at full length on all the points in the libel—(hear). And then the General Assembly did not pronounce judgment on a matter that was not before it, because all the evidence was in our hands; and, in bringing up the whole evidence, the parties really and substantially brought up the whole counts in the libel for the final decision of the General Assembly. (Applause.)

In regard to the other case, in which we marked our sense of the heinousness of the ecclesiastical crime committed by Mr. M'Millan by a summary sentence of deposition, without process, I am not here to deny that it might have been competent to us to take another course. It might have been competent for us to adopt the course of process by libel, and not only to hear Mr. M'Millan at full length, but to let him go through the whole forms of process in the way of libel by his Presbytery. That might be competent for us. But it could not in the circumstances be held, according to the principles and constitution of this Church, to be in the slightest degree necessary. We have the express law of the Church requiring her courts—not only permitting, but enjoining them—to show her displeasure against whosoever shall seek to stay her discipline by applying to the Civil Court, by summary deposition from the office of the ministry, without libel and without process. (Hear, hear.) We acted on that well-known law—that well-known part of the constitution of this Church. And if anything could have convinced me more strongly than

before that we did perfectly right in so acting, it is the conduct of the defender since that time. (Hear, hear.) Moderator, I think we did perfectly right in marking our high detestation of such a procedure as carrying our spiritual sentences into the Civil Court for reduction, and attempting to stay discipline by an application for an interdict, by an instantaneous act of deposition from the holy ministry. The only competent way in which any one guilty of such an offence,—found guilty of it by his own confession,—could approach the General Assembly, was in the attitude of a penitent expressing his penitence, and submitting himself to the Church accordingly. (Applause.)

It is, of course, irrelevant to go so far as I have gone in dwelling upon these sentences. But now the time has come when this whole matter must be fully explained over and over again to our people throughout the country. I think it most desirable that this Church—that the ministers of this Church—should thoroughly inform themselves as to the grounds on which these sentences were passed, and repudiate anything like the inference drawn, that because we deny the right of the Civil Court to reduce these sentences be they ever so bad, therefore we admit that the sentences *were* bad.

Another prejudice that operates against us in this case, and the only other one I shall notice, is embodied in a question that is sometimes put—and put, perhaps, even in a friendly spirit—How is it that other Churches have existed in Scotland, not connected with the State, for more than a century—for a century and a half nearly,—how is it that we have had the Secession Church, the Relief Church, the United Presbyterian Church; and how is it that these Churches, and other Churches in the land, not connected with the Establishment, have existed for so long a time, and no such case has arisen to trouble them? How is it now, that so very short a time since our separation from the State, we should be

troubled with such interference on the part of the Civil Court? The obvious inference intended to be suggested is this, that whereas these other Churches have been wise and prudent, and have kept to their own sphere, there must have been something outrageous in our conduct to provoke the interference of the Civil Courts: that if the Civil Courts did not come down on these other Churches for nearly a century and a half, it must have been because these Churches were civil, prudent, well-behaved Churches; whereas it comes down upon us because we maintain some monstrous principle—some radical principle—some principle involving civil insubordination; that, in short, it must be some fault of ours.

Now, there are two answers to that question and suggestion.

The first is the fact that never in the course of the history of these Churches—and there are some of our friends here present, belonging to these Churches, who will bear me out in that—never in the course of the history of these Churches has any such case as this been brought. (Hear, hear.) There has been no action asking the Civil Courts to reduce spiritual sentences, or to set aside a spiritual procedure within the Church herself. (Hear, hear.) Plenty of actions have been brought—actions of damages and actions regarding property—actions of damages for alleged wrong done in the exercise of discipline, and actions raising the question to whom does a church, or a manse, or a glebe belong;—plenty of such actions have been raised. But never once have they been raised through any attempt to set aside spiritual sentences, as such; never once have the spiritual sentences of these Churches been attempted to be touched. Now, Moderator, that is one sufficient answer, showing the difference between our position and the position of these other Churches—that now, for the first time, the Civil Courts (I do not care under what pretence or on what plea) are indicating their willingness to can-

cel, to reduce, to rescind spiritual sentences. That is a new thing in the history of non-established Churches.

But I have another answer, and I think a far more important answer (Hear, hear.) This case is not to be regarded as altogether new. This case cannot be separated from the action which the Court of Session took during the Ten Years' Conflict—(hear, hear)—which issued in the Disruption. We cannot separate the proceedings of the Court of Session now from the proceedings of the Court of Session then. For it was then that they “fleshed their maiden sword” in this matter—it was then that they acquired the extreme facility which they seem to have got in handling spiritual matters as if they were civil. (Applause). We must remember that it was during our struggle while in the Establishment, that the Civil Courts were asked, and consented, directly to touch spiritual sentences—sentences of deposition from the office of the holy ministry—sentences as directly, as immediately, and as exclusively spiritual as this which we pronounced in the case of Mr. McMillan. They were asked to touch these sentences during our struggle—they did touch them, as we all know; and they got to touch them with a sort of familiar fondness. (Laughter and loud cheers.) We were accustomed to maintain, over and over again—I believe I have myself said it more than once in the General Assembly—that the principle on which they proceeded in touching the spiritual sentences of the Church Courts then would, if fairly carried out, warrant their touching equally all Church sentences. (Hear.) No doubt, at the first, there seemed to be an impression—and the plea was always put forward—that these spiritual sentences of ours were somehow connected with questions about stipend; and that therefore these spiritual sentences came under the review of the Civil Court, because these stipends were the gift of the State—these stipends were state property, enjoyed at the State's discretion by the Church—

these stipends, therefore, brought the matter under the control of the State Court. We, of course, were accustomed to maintain that they might separate these two things—that they might look at and deal with questions about stipends, without touching spiritual sentences. We were overborne and overruled. From less to more they went on, as we all know. They did touch our spiritual sentences. And they touched them, as the contest went on, even where there was no civil interest whatever that could be pretended to be affected; where there was not, and could not be, any civil interest at all connected with the case.

I must be allowed to refer to the history of the past—to show that this is not an afterthought, but that we were alive to the consideration that the principle on which the Civil Court was thus acting was a principle of a much wider sweep than many thought; that that principle really amounted to nothing short of the assertion, that they were perfectly warranted in interfering with the sentences of a spiritual court, whether established or not, whenever any one should choose to say that he was personally injured. Now, to prove this, Moderator, I take the liberty of quoting from a book which is well known, and which I hope this coming struggle, if it is to be a struggle, will make better known—the “Ten Years’ Conflict”—(applause)—a book which I hope the Presbyteries of the Church will see is thoroughly known by all entrants to the ministry—following the example of the metropolitan Presbytery, which examines third year students regularly upon this book: it is an example which I hope the other Presbyteries of the Church will not hesitate to consider worthy of imitation—(cheers). I quote from this book for the purpose of showing that what I have been alleging is not an afterthought of mine. I refer to what is said about the Culsalmond case. It was a purely spiritual case, and had nothing whatever to do with any civil matter. Mr. Middleton,

who had been officiating as assistant at Culsalmond, was simply interdicted from dispensing religious ordinances for a time, and the minority of the Presbytery, —the majority being recusant,—were enjoined to supply ordinances. There was avowedly no civil question that could possibly be regarded as turning upon that procedure of the Church. Now, in reference to that case, I find the author of this book saying, “Lord Ivory could not believe what, however, had been over and over again foretold in the General Assembly—that the claim of the Court of Session to jurisdiction in all matters which might seem to affect civil rights, was a claim elastic enough not only to reach this case of Mr. Middleton, but any other case with which the Courts of the Church should ever be called to deal.” Further on, this remark is made: “For while the principle might be applied only where stipends and patronages were concerned, if it was good for the purpose of overthrowing ecclesiastical sentences merely because they indirectly affected such civil interest as this, it would soon be discovered to be quite as available for overthrowing any ecclesiastical sentences whatever.” (Cheers.)

Now, I refer to these things, not of course for the purpose of simply saying that we were right in our opinion that the principle then maintained by the Civil Courts had so wide a sweep as to cover what is now taking place; but rather, to point out, not only to our own view—but if I might venture to speak to other Churches, to the view of these other Churches—the danger in which our liberties now are. If this were a mere *extempore* sort of idea of the Court of Session, then we might hope that it was a sort of whim or hobby that would pass away. But it is right that we should be alive to the gravity of the case—to the seriousness of the crisis. And it is with that view alone that I ask this Commission of our Church to connect what the Civil Court is now doing with what the Civil Court learned to do then; to see that the Civil Courts

apparently have set themselves—not by a sudden impulse, but deliberately—to assert a principle that is inconsistent, not only with the liberties of the Established Church, but with the toleration of any Christian Church whatever. (Hear, and applause.)

I pass on now to say a few words—they shall not be many—on the subject of this interlocutor of Lord Jarviswoode, his finding and his reasons. The note appended to his interlocutor is one which I have read carefully. Some parts of it appear to me, with all deference to the learned judge, to be very weak; and after all the study I have been able to give them, other parts are to me perfectly unintelligible. (Laughter and applause.) I take the liberty of giving just a single instance of each sort.

I do not pretend to know what is judicial and what not. But surely it is an extraordinary reason to give for repelling these pleas of ours, simply that “they might be pleaded in bar of any claim for reparation in respect of wrong alleged to be suffered,” and “the pursuer is thus driven to the necessity of challenging these sentences.” Why? Not because Lord Jarviswoode is of opinion that these sentences do really stand in the way of his getting reparation,—not because they may be legitimately pleaded in bar of his getting reparation,—not because Lord Jarviswoode is of that opinion; but because Mr. M’Millan’s counsel may choose perhaps to say *they* are of that opinion. (Laughter and cheers.) Because they choose to aver that these sentences of ours, if not reduced, may stand in the way of the man getting such civil redress as it may be competent for him to get, therefore “he is thus driven to the necessity” of this course. Lord Jarviswoode will not take the responsibility of saying whether the plea is right or wrong. (Hear hear.) In repelling *our* pleas, at the very least he was bound, I humbly think, as a judge to do so. Not to say that “the pursuer alleges that these pleas are a

bar;” but on his own responsibility to declare that in law they are a bar. (Hear, hear.) He has not dared to do so, and I question whether any judge on the bench will say that these sentences of ours may be validly pleaded as a bar, if not reduced, in the way of getting redress. We never pleaded them in bar of the man getting any civil redress they like to give him. They may give him damages if they choose—let him get damages from the Church if he can. We contend that these sentences of ours, as spiritual sentences, do not hinder the Court of Session from looking the thing to the utmost in the face, and giving him redress just as if the sentences had no existence; or, on the supposition of their existence, as if they were the most monstrous piece of injustice which the Inquisition ever practised. We admit all that. We never pleaded them as a bar in the way. But because “they *might be pleaded* in bar of the man getting redress,” therefore, says Lord Jarviswoode, the defender “is driven to the necessity of challenging them.” He, a judge, says this without taking the responsibility of saying whether our sentences really are or are not bars, and so he insists that they are to be swept out of the way because they “might be pleaded.” (Applause.)

Another extraordinary thing in the note,—and one which I cannot understand,—is the argument that his lordship seems to urge in favour of the principle, that the Court of Session must be the judges in regard to what our constitution is, and whether or not we are adhering to our constitution in every instance. It must be in the power of any one to carry this question,—namely, what is our constitution, and whether we adhere to it in carrying out our spiritual sentences—it must be in the power of any one to carry this question into the Civil Courts. For Lord Jarviswoode says: “When, as here, a member of the body challenges its acts as contrary to the constitution, the terms of that constitution, as forming the measure of the obligation among the members of the

body, must be admitted or proved. To hold otherwise, would truly be to deny to such an association that power to regulate its own constitution, and to frame its own laws, in *which its liberty consists*." It thus appears, according to his lordship, that our liberty consists in this, that any member of our body may drag us into the Civil Court on this question of our constitution, and whether we are adhering to it or not; and we must follow him there. That is the liberty with which the Court of Session, it would seem, is inclined to favour us.

But now, in regard to the interlocutor itself, I think the meaning of it is very plain. Let me speak first of what it reserves, and then of what it repels.

The question reserved is, What is our constitution, or the contract between Mr. M'Millan and us?—what is the constitution of the Free Church of Scotland to which Mr. M'Millan bound himself to submit, and whether we were or were not adhering to that constitution in our proceedings against him? We urge, as one of our pleas, that by our constitution Mr. M'Millan is prevented from seeking this particular redress which he is now seeking; and that plea is reserved. Now, it is reserved apparently on the ground of more evidence being required—more evidence as to what the constitution is which Mr. M'Millan has solemnly bound himself to acknowledge. More evidence is required as to what our constitution is, and as to what is the amount of Mr. M'Millan's obligation under that constitution. I think it is important to call attention to a fallacy here. What more evidence can be given as to what our constitution is? We put in our Claim of Rights—we put in our Deed of Demission—we put in our Formula. We put in all the documents that constitute really our profession as the Free Church of Scotland, and in that way show what the terms of our constitution are, and what Mr. M'Millan's obligation under that constitution is. We have no more information to give—we have no more evidence to lead—we

have nothing more whatever to say on that point. There is a gross fallacy in calling for more proof, and it arises in this way. In the course of the pleading, Mr. M'Millan has referred to the usages and rules of the Church of Scotland prior to the Disruption as still acknowledged by us to be binding upon us, in so far as they have not been repealed, in our ecclesiastical procedure. Now, we totally deny the competency of any reference to these rules and precedents as regards the question whether our constitution shuts out the Civil Courts from the review of our spiritual sentences. I know that reference to these precedents and rules may be very right and legitimate within ourselves, in discussing within ourselves what is the proper form of procedure, how we should dispose of particular cases that come before us, and what spiritual sentences we should pronounce. In arguing among ourselves on these points, or in arguing with Mr. M'Millan or any one else at our own bar, we of course refer freely to the precedents and rules binding upon the Church before the Disruption as still in force, in so far as they have not been modified or repealed. That is quite true. But all that is merely with the view of our making up our minds as to what our sentences should be. In judging of the particular question, however, now raised on the part of Mr. M'Millan,—which is not, whether according to our constitution these sentences are, in view of these rules and precedents, right—but are they liable to challenge and reduction in the Civil Courts,—we have nothing whatever to do except to point to the Claim of Rights, the Deed of Demission, and the Formula. We have nothing whatever to do except to point to the solemn obligation, under which we hold that every man comes when he enters this Church—that be our sentences right or wrong, he will not carry them for reduction into the Civil Courts. That is the point on which we are at issue. To crave more evidence about the rules and precedents in force in the Church is nothing to the purpose

here. To the question, as to who is to be the judge of our adherence to these rules and precedents,—We are exclusively the judges, is our plea. “No,” is their plea—the Court of Session is to be the judge. But how is that to be determined? Not by looking at these rules and precedents, but by looking at the constitution of our Church, as embodied in the documents I have named, to see whether it allows of an appeal to the Civil Courts upon the pretence that our ecclesiastical rules and precedents have been violated. (Cheers). That is the point at issue. But for the determination of that point Lord Jerviswoode has got all the information he possibly can get. If we went before a jury to-morrow we have not a word more to say than we have already said.

Then, again, as to the pleas that have been repelled, I suppose the meaning of the interlocutor is very obvious.

In the first place, the repelling of those pleas is a distinct assertion that the Civil Court will not, and cannot, distinguish between things spiritual and things civil. Lord Benholme's finding was that, in respect of the subject-matter, this action is not competent. His finding was the finding of a man who could draw the line between what is civil and what is spiritual. Looking at the subject-matter, he saw at once that it was an ecclesiastical sentence, pronounced by an Ecclesiastical Court, in an ecclesiastical case; and taking that plain, common-sense view of it, he at once pronounced it to be not civil, but spiritual; and therefore, being in its nature a thing spiritual, not within the competency of the Court of Session to deal with. But the sentence of Lord Jerviswoode very plainly reverses that finding of Lord Benholme. Accordingly, if that sentence stand at law, it is now declared that the Civil Courts do not distinguish between matters civil and matters spiritual. That is a new thing for the Civil Courts to say,—that they cannot trace the distinction between a matter spiritual—a matter avowedly

affecting conscience alone—and a matter civil, touching person or property; that they cannot recognise any distinction whatever between things in their own nature civil, and things in their own nature spiritual. I would just like to hear some of our lawyers who take a patriotic and constitutional view of this question—I would like to hear any one who is familiar with history—say how long the liberties of any country would be safe if the Civil Courts cannot distinguish between matters civil and matters spiritual. (Cheers.) Let any student of history answer that question. Let any student take up the whole of modern history, and the greater part of ancient history, and answer that question—How long the liberty of any country would be safe if the civil power gave forth the principle, and acted upon it, that they could not distinguish between things spiritual and things civil? (“Hear, hear,” and cheers.) If there be any one maxim more thoroughly in accordance with all history than another on the subject of civil and religious freedom, it seems to me to be this—that the basis of civil liberty is liberty of conscience—(hear, hear)—and that without liberty of conscience there can, in the long run, be no liberty whatever. How the civil magistrate is to recognise and protect liberty of conscience without drawing the line between matters spiritual and matters civil, will defy, I think, even the Court of Session to show. (Applause.) That is the first principle involved in that judgment, and a very grave and serious principle surely it is.

The other is, that as they cannot distinguish between things, so neither can they distinguish between persons. They cannot distinguish things spiritual from things civil—they have no sort of eyes for that. Neither, apparently, can they distinguish persons, or associations of persons. They cannot distinguish, apparently, an association of persons combined for the worship of God, for mutual edification, and for the improvement of one another in manners and morals, from

an association of persons in an insurance company, or in a debating club. That really is the effect of the decision. It is an absolute refusal to recognise any distinction between a Church or ecclesiastical body, and any other body of men associated for any purpose whatever in accordance with the law.

Now, Moderator, if this be the principle fairly involved in the rejection of our pleas, I need scarcely say that we are indebted to Lord Jerviswoode for putting the question in so plain a light that he who runs may read. (Hear.) Now—now I think, it must be clear to all men that the battle is not for any outwork, but for the very citadel—that what we are called to contend for is just the right of conscience—the right of conscience, both in individuals and in associations of individuals—the right of a society to meet, avowing that it meets, not by mutual consent, but by the ordinance of heaven. (Hear, hear.) Of course this plea is a plea of conscience;—and it is only as a plea of conscience that we would ever expect the civil magistrate to recognise and respect it. We do not ask the civil magistrate to say that he believes we are a society meeting and acting together under the divine ordinance. But we ask him to regard us as a society saying that we meet and act together under the divine ordinance; and we ask him to give us credit for saying that honestly and conscientiously. We say that unless we have full liberty, as a society, to carry out our views,—to meet and act, as a society constituted, not by mutual consent, but under the divine ordinance, we are not enjoying the full benefit of the toleration and protection of the State. (Applause.)

I may be allowed now to go a little into the general question of the Church's claim, having got over the prejudices that I have stated, and disposed of the special judgment before us. For we are now really come to the point at which the abstract question, as it may be called, is raised, and must be fixed. It is important, therefore, that the whole world

should know what it is that, as a Church of Christ, we really claim, and what the refusal of our claim implies.

Here, in the first place, it should be thoroughly understood that we concede a great deal to the civil magistrate—that is, to the Supreme Power, and to the subordinate powers in the State. For example, we concede and admit the full right of the civil magistrate to be thoroughly informed, and thoroughly to inform himself, in regard to everything that we do. We admit his entire and perfect right to know what we are about, to know every step that we take, and to be informed thoroughly as to our proceedings. Further, we admit his perfect right to form his own judgment in regard to our proceedings. We do not ask him to take our judgment—we thoroughly and fully admit that it is his right and duty to form his own opinion, and pronounce, if he see cause, his own judgment, upon every step that we take. If he should be of opinion that any step which we take is against good morals—that any step which we take is *contra bonos mores*—he is perfectly entitled, of course, as we held ourselves entitled in India to put down idolatrous practices on the ground of their abominable cruelty—he is perfectly entitled to form his own opinion in regard to that, and to act upon it. For we say he is not only perfectly entitled, but bound, in whatever question comes before him arising out of our proceedings, to follow his own judgment and not ours. We distinctly maintain that if any question whatever of any sort comes before him in connection with any proceeding of ours, he is not bound to follow our opinion, but he is entitled to follow his own, and bound to do so. Further, we of course claim no right whatever to exercise any discipline or any control over parties who do not belong to our communion. If anybody raises a question in the Civil Court whether he belongs to our communion or not, we say at once that is a question with which the Civil Court must interfere and must deal. They must entertain the question, if I

go to them and say that such or such a Church has pronounced a sentence against me when I was not really a member of that Church. The civil magistrate is bound to listen to me, and bound to look into the case, and form his own opinion, and give what civil redress he can, if he thinks I have been dragged under the ban of a Church to which I had not consented to belong. These, surely, are important admissions. Then, moreover, we most fully and thoroughly admit that we have no right whatever to use our discipline, or put forth any exercise of ecclesiastical power, for the purpose of injuring any man's property or person. If any man alleges that we are using our ecclesiastical power for the purpose of injuring his property or person, we say that man is entitled to appeal to the protection which the Civil Courts of the country can give him. (Applause.) All these things we admit, and we think they fully cover all that can fairly be required on the part of the civil magistrate for keeping the Church within bounds, and preventing the Church from interfering with the liberties, and properties, and persons of the subjects of the realm.

I may refer to a case that has been pleaded by Lord Jerviswoode—the case of Sir William Dunbar. I do not go into the technicalities of the case, but plainly it seems to fall under one of the concessions I have now made—namely, that we have no right to exercise discipline, or put forth ecclesiastical power upon any man who does not belong to our communion; for the real question that was raised was simply this,—not whether the sentences pronounced by the bishop were competent in themselves, but whether Sir William Dunbar was really under his jurisdiction at the time they were pronounced. That was really and substantially the question that was raised. Was the exercise of discipline on the part of the bishop an exercise of discipline over one who was under his jurisdiction? The Court held that Sir William Dunbar's original connection with the bishop had been conditional—that

the conditions had not been fulfilled—that Sir William Dunbar had withdrawn from his connection with the Episcopal body—and that of course the exercise of discipline in the case was wrong, and that Sir William Dunbar would be entitled to damages. They did not pretend even then to reduce the sentence, however, but they were willing to give redress for the wrong. (Hear.)

These are things which we frankly concede to the Civil Court—these are matters in regard to which we fully acknowledge the competency, and the right and duty of the civil magistrate to form his own opinions, and act upon his own opinions, irrespective of anything that we may say, or think, or do.

What, then, after all, does our claim really mean? It means this—nothing else than this, and nothing less, nothing more than this,—that we shall be entitled to say who shall and who shall not be members and office-bearers in our communion. (“Hear, hear,” and applause.) This is the sum and substance of our whole plea. (Hear, hear.). We ask no more than that, and we can do with nothing less. We admit fully the competency of the Civil Courts to act according to their own judgment, and deal with our sentences in any way they choose. We simply ask them to respect our right to declare who shall and who shall not be office-bearers in our Church, and who shall and who shall not be members of our Church. But, Moderator, with any liberty short of that, surely no Christian Church could exist almost for a day in the land, except only as the Christian Church existed in past ages, and can exist again—under persecution—(hear, hear)—for obeying God rather than man.

It is here precisely that the element of conscience comes in—the element of divine authority; not of divine authority which we ask the Civil Court to believe that we have, but of divine authority which we ask them to believe that we conscientiously say that we have; for that is all. We are not merely in the

position of a body of men associated by mutual consent—our association is not based upon consent merely. Consent, as I have admitted, is indispensable to form the connection of any man with our body; but the association itself, although connection with it may be based on consent, is not itself based on consent. (Hear.) My connection with the association is based on consent, but the association with which I connect myself is not based upon consent. I connect myself with it, knowing and avowing that I connect myself with an association which itself believes, and which I believe, to be founded upon conscience and the express ordinance of God. (Loud applause.) Now, suppose the case of an association founded merely upon consent, interfered with by the Civil Courts. The Civil Courts find that such and such proceedings are contrary to law—that such and such proceedings are null and void. They find that such a man is wrongfully expelled, and must be received back again. If consent be all, then we have many alternatives—the association, I mean, has many alternatives. We may consider,—Can we or can we not, against our own mind and judgment, accommodate our procedure to the judgment of the Civil Court? It is a mere matter of consent. Or we may consider, if we cannot do that,—Cannot we dissolve the society?—cannot we dissolve the whole body? If it is an assurance company, and we are unduly interfered with, we may consider, first, whether we may not conform to the Civil Courts' desire; and if we cannot do that, whether we may not separate, and dissolve, and break up. But when an association pleads—and the State must believe they plead in earnest, else there is no toleration,—when an association pleads that it exists by divine authority—the authority of Him who alone is lord of the conscience—when an association pleads that, and the Civil Court comes in to review and reverse its proceedings, that society has no alternative. (Hear.) That society cannot adopt the plan, either of adapting its pro-

cedure to the dictates of the Civil Courts, or of dissolving itself. (Hear, hear.) It can do neither the one nor the other. It must simply stand and suffer. (Applause.)

Look now at the claim set up on the other side. It is a claim to reduce our sentences. I am quite aware that there is some sort of shadowy distinction held out to us in this very Note of the Lord Ordinary, as well as in the Lord President's speech, by which the Lord Ordinary seems to hold himself bound. There is some sort of hint that the reduction of our sentences is to be done in a delicate and tender way. The eel is to be skinned very tenderly—the worm, according to Isaac Walton's plan, is to be impaled “as though they loved him.” (Laughter and cheers). “Oh,” it is said, “you need not be so much afraid; we will handle you very gently; we will reduce your sentences only to civil effects, in order to let us get at the action of damages. If you will have patience you will see that the reduction of the sentences is not so formidable a thing after all. It may even turn out something very beautiful.” Some sort of shadowy, ideal, half-reduced sentence looms in the distance, which is to reconcile us to the whole operation. I have several reasons for demurring to our being drawn away by this fair ideal.

In the first place, before it comes to that, I should like that the Civil Courts were shut up to say whether or not it is indispensable. Before I embrace this *semi reducta Venus*, I would like to know whether the Civil Courts cannot possibly manage their business without forcing her into my arms. I am entitled, I think, before they talk about any shadowy distinctions of that sort, to ask whether anything of that kind is needful in order to get any action of declarator, or any damages, or any restitution of manse, glebe, or Sustentation Fund,—I am entitled to ask them to say whether, and on what ground, it is indispensable that these sentences of ours should be touched at all. The Civil Courts may

come and say, "We are extremely anxious to respect your rights to the utmost, but we have a solemn statutory duty to perform, and we cannot possibly get at it except through this door; we must open it a little." But I say first, "I have a little objection to that door being touched at all. You say that you will open it very cautiously and very gently. But I am surely entitled to ask you to show me why it is necessary that you should open it at all. There is another door already open to you—there is your action of declarator, or your action of damages. Let our sentence stand. Deal with it as *res judicata*. Take it is a matter of fact. Make a kirk or a mill of it if you choose—(laughter). But don't open this door."

But, secondly, I am inclined to say, I don't quite like this sort of half-open door—this sort of partially reduced sentence; because, as "burnt bairns dread the fire," so I have got some experience of that sort of thing in times past. We were told, in our former battle, "You needn't be so much afraid; it is not your spiritual jurisdiction that is going to be touched, but we must get at the question of stipend; we must get at the Veto Law; we must get at the rights of patrons;" and so forth. We told them over and over again, "You can vindicate the rights of patrons—you can deal with the stipends as you like—without touching our sentence." But we were always told again, "You needn't be so much afraid, we just touch your sentences to civil effects." Very well, by-and-by it plainly appeared that they were going to touch our sentences in the first instance delicately, but soon boldly and sweepingly enough, as I have shown. They came to have a sort of pleasure in touching our sentences, even although there was no civil question at all alleged to be connected with them.

I have another objection, in the third place, to allege to this idea of a sort of partial reduction. I don't pretend now to be so much of a metaphysician or a logician, as I perhaps once might have been; but I question a little the possi-

bility of anything like a partial reduction. Really I should like some hair-splitting lawyer to enlighten me on this point, as to the possibility of this sort of half reduction—this sort of touching our sentences for one purpose, and letting them stand for another. Really—

"To be or not to be, that is the question." (Laughter.) Is the sentence to exist or not? If the Civil Courts reduce the sentence, how can they, after reducing it, say that the sentence is there to any effect at all in any sense whatever? Either the sentence is or the sentence is not. If they allow the sentence to be, we give them full permission to do what they choose with it. But if they say the sentence is not to be, why then the sentence is not—(laughter and applause)—and there is an end of the matter.

That is not metaphysics only, Moderator, nor is it simply a plea of form. It may be practically shown—very soon it may be practically found—that no such distinction possibly can be made. And this is my fourth and last objection. We used to be always told, and I suppose it is true, that the Civil Court never moves, but that some one must move it. It cannot act spontaneously—it has no spontaneous life or principle of activity. It must be put in motion. But it follows that if somebody moves it, it must move. There is the point. (Laughter.) It may be shown that whatever they may mean by this reduction, it cannot stop there.

The sentence is reduced. Mr. M'Millan accomplishes his object of the sentence being reduced. No matter what the Civil Court may intend by that—Mr. M'Millan, having got that, proclaims himself to be in the eye of the law the minister of the Free Church at Cardross. And he is entitled to proclaim himself to be in the eye of the law the minister of the Free Church at Cardross. Well, what follows? I don't suppose any Presbytery of our Church would go the same road that the Presbytery of Strathbogie went. But there might perhaps be found one or two rebellious individuals,—

or we might even find one or two honest, but crotchety men—who might come to the opinion that they were bound to obey and respect the civil sentence, and to recognise Mr. M'Millan as minister of the Free Church at Cardross. They fraternize with him accordingly, invite him to their communions and assist him in his, and are deposed by us for doing so. Well, Mr. M'Millan and these persons might go to the Civil Court, and might move the Civil Court to recognise them as the Free Church of Scotland. (Hear, hear.) I would like to know how the Civil Court would get out of that? I would like to know how they could help recognising Mr. M'Millan and his friends as the Free Church of Scotland, and handing over to them this building, and every other building and property belonging to the Free Church of Scotland. I do not see, for my part, how the Civil Court could help that, any more than they could help formerly supporting ministers censured for what they called obedience to the law. Or the affair might take the shape of Mr. M'Millan claiming his seat in the Free Church Presbytery of Dumbarton. His claim is refused. He applies for an interdict against the Presbytery doing business without him, or brings a declarator to have it found that all the proceedings of the Presbytery, taken in his absence, shall be null and void. I cannot see how the Civil Court can stop short of granting his prayer. They must acknowledge Mr. M'Millan's full right to claim his seat in the Presbytery of Dumbarton, and declare the proceedings of the Presbytery null and void, so long as his right to take his seat is refused.

I do hope that, among our friends at least, we shall hear nothing more about this claim on the part of the Civil Court which is implied in repelling our plea, being one that might be even partially allowed with safety to our spiritual freedom. It is the first time in Scotch law—it is the first time in the common law of this country—that any such thing has been admitted as a direct reduc-

tion of the sentences of a Church—of a Church that owes nothing to the State, and asks nothing from the State.

Whether our friends of other denominations were right or wrong formerly in saying that in virtue of our connection with the State, and our deriving certain emoluments from the State, we must necessarily be to a certain extent under State control—it is not worth while now to inquire. The plain fact now is that here a new principle is about to be asserted in Scotch law—a new principle in the constitution—the principle, namely, that the Civil Court may at any time and to any effect it chooses, reduce the spiritual sentences of an ecclesiastical court tolerated in the land. That is the serious and grave nature of the case now at issue. It is, I say, the question of a principle now asserted, I believe, for the first time. It is impossible to look at that summons without seeing what it means. Damages are spoken of, no doubt. But can any one look at the action about our sentence of suspension, and not see that the damages there concluded for are claimed on the supposition that our sentences which have done an injury to Mr. M'Millan are to be reversed, and Mr. M'Millan to be reponed, and get again his former position as a minister, and participate in the Sustentation Fund, and have everything else that he had before, with damages simply in the way of *solatium* for the time he has been kept out, and the trouble to which he has been put. (Hear.) That is the first action. The second, in so far as it is an action against the Church, concludes for no damages at all, but simply for the reduction of our sentence, and the reponing of Mr. M'Millan into the position he occupied before. That is the grave nature of the summons.

Really, Moderator, I cannot help saying how much I wish that our legal men, and the judges of the land, would read the history of the past, and look at this question, not through any mere technicality, but on constitutional grounds. Surely they might come to perceive that

it must indeed be a serious matter when a question is raised which deals with the constitutional standing of the Church of Christ in this free country of ours. So serious is it, that I am not surprised to hear of some who, in the view of its possible issues, are inclined to ask whether there is no possibility of compromising this question. "Is there no possible way," they inquire, "in which Mr. M'Millan can get his pecuniary compensation somehow or other, and this question be postponed?—If necessary, we can take it up again as a question of abstract principle." Some of our friends are so much alarmed about the question that they would fain, if it were possible, adopt some intermediate course. But I believe it will be practically impossible to adopt any intermediate course without surrendering these pleas—(hear)—without admitting substantially that we have no standing whatever as a Church in the land. If we do not do that, we must stand upon the abstract principle, as it may be thought, of the right of the Church of Christ in this Christian land to be recognised in the exercise of her discipline; in declaring who shall and who shall not be members and office-bearers in her communion.

It is premature to anticipate consequences. I hope, as things move on—because this may be but the beginning of a somewhat protracted struggle—it may require time, and it may require pains, to explain it fully in all its bearings; but I trust that as things move on men's eyes will be opened in and out of the Parliament House, to the magnitude of the question now at issue. I for one cannot suffer myself to believe that this question will be decided in the Court of Session without the opinion of the whole Court being taken. (Hear, hear.) I cannot suffer myself for a moment to doubt that this question will be viewed by the judges as a question equal in gravity to the question in the Auchterarder case, in which they took the opinion of the whole of the judges. (Hear.) If, as I believe, they are in the habit of taking the opin-

ion of the whole Court on trumpery cases about a little property, or a little petty personal claim, I think it is not to be anticipated or imagined as possible that a question like this—a question so gravely affecting the interests and the very existence of the Church of Christ—a question so gravely affecting constitutional law—will be decided without the opinion of the whole judges being taken. (Hear). It is very plain that the question cannot rest in the Court of Session. (Applause.) Therefore it is all-important—indeed, I would almost say, indispensable—that before it comes up to the Court above, the opinion of all the judges should be taken. As to the Court of last resort, it is not for us to speculate on what may be the course of procedure there: I confess that whatever doubts I have as regards our own Court—chiefly because it has got so dreadfully mystified by past proceedings, and got into such a state of confusion of ideas upon the subject of civil and religious rights and liberties—I have some hope that this question might be put in a way that would commend itself to the common sense of Englishmen, whether in the House of Lords or throughout the country. For we must, if this struggle goes on, have our dissenting friends in England along with us. (Applause.) We must make our claims plain and palpable to the whole world.

I cannot help thinking it probable that when Mr. M'Millan goes to England to state his case before Englishmen, they may be inclined to take a broad, common-sense, English view of the matter. They may be very much inclined to put to him this question, "Mr. M'Millan, what is it that you want? State to us precisely what it is you want. Do you want to be restored to the holy ministry in Cardross, or do you want to get damages for alleged wrong? Tell us plainly, and let there be no ambiguity. If you want the former, you cannot get it. If you want the latter, say so distinctly; let this case go, and bring another action without a plea of reduction in it." Surely it is plain

common sense that this question might be put to Mr. M'Millan, "What is it you really want?" Some of our friends believe that, after all, Mr. M'Millan only wants damages—that he wants civil reparation for the wrong that he alleges our spiritual sentences have done. Now, I think it right to say,—and I do not think I am violating any rule of propriety in saying,—that I have the best ground for assuring you and all the world that this is not what Mr. M'Millan wants at all—(hear, hear)—that Mr. M'Millan, or those backing him—I don't know who they are—distinctly declare that they want the reponing of Mr. M'Millan into his charge at Cardross—that they want to bring the Church into the position of being compelled to own the civil power in this spiritual matter—(hear)—in the matter of the sentences pronounced against him. (Hear, hear.) I have evidence to that effect. It is quite a mistake to say that they merely want damages. They want the reduction of the sentences and the reponing of Mr. M'Millan. I am not going too far in saying that this is the real question raised by certain parties, who would like the Church of Christ to be brought into a state of thorough subjection to the civil power. (Applause.)

Now, Moderator, I would like just to say one or two things in regard to what seems to be our duty. I hope the Commission will approve of the step that has been resolved on, of appealing this case to the Inner House. (Hear.) But I hope they will do more than that. We have a committee for managing this case—that is, for managing it simply in a legal point of view, for advising with counsel, and so forth. But the case will require to be managed in a broader aspect, and in broader bearings. I hope this Commission will not separate without appointing a large and influential committee, consisting of ministers and elders through all the Church. That committee shall be intrusted with the duty of co-operating with the Assembly's Committee, and endeavouring to take

measures duly and properly for enlightening the country—(hear)—for enlightening our own people in regard to this matter—(applause)—for obtaining the necessary funds, and for conferring and consulting with the brethren of other denominations; for we must endeavour to secure in this great question the co-operation of our friends of the United Presbyterian Church, and the Original Presbyterian Church, and all other non-established bodies in the land. I rejoice to state that we have the fullest assurance, on the part of influential men among all these bodies, of their thorough sympathy with us, and their thorough determination to stand up for us. Moreover, if we are to be involved in a serious struggle for our very liberties, I hope that this Commission will instruct its large committee to enlighten the people, not only in Scotland, but if needful across the Border—(hear)—and I am not sure but England will be a great deal the better of a question of this kind passing across the Border.

I earnestly hope that this Church will deem the present struggle at least as vital as the struggle that seemed to be ended in the Disruption. To my mind it is equally, if not more so. We could then pass from the platform of the Establishment to what we held to be the broader ground of religious toleration. We were always patted on the back, and encouraged, and told, "Oh, just get down from this platform of the Establishment, and then your liberties are safe." That was always what we were told. We had therefore, or were told that we had, a way of escape then. Now we have no alternative. We have no other ground on which to stand than that which we took—you all know at what a sacrifice—at the time of the Disruption. We have no other platform on which we can take refuge. If this is declared to be the law, we will simply require to stand and suffer. We cannot escape.

We will then be in a somewhat analogous position to that in which the Pro-

testant Church in France is,—both the Protestant Church connected with the State, and the Free Protestant Church in France. Nobody would say that these Churches are tolerated. They exist, no doubt, with a certain liberty of action. Their ministers are permitted to preach. But their Synods are not permitted to meet. They have no freedom of ecclesiastical action. Nobody would say that these Churches are tolerated fully, as Churches. Well, we may be reduced to that position. Nay, our position might even be worse. I am not sure that, even in obedience to the Civil Court, we could give up our Presbyteries and Synods. (Hear, hear.) I am not sure that we could forget the maxim of Knox—"No Assembly, no free gospel." We would scarcely be in the position of our forefathers before the Revolution. They were prevented from meeting. I do not know that we would be prevented from meeting. But we would meet *cum periculo*; we would meet to decide questions at our peril. And there, perhaps, would be found an aggravation of the wrong done to us. The law might be such as not to prevent our meetings, as they are hindered in France, and as they were hindered also in the days before the Revolution in our own country. The law might allow our meetings, only declaring substantially that whatever we do—in our Kirk-sessions declaring so and so not to be admissible to the communion table, onwards throughout our Presbyteries and up to the General Assembly—is subject to review, revision, and reversal in the Civil Court. Thus we might be suffered to carry on our business, only on peril of having our sentences reduced, and ourselves subjected to civil pains and penalties unless we consented to their reduction. That, surely, is a state of matters alarming enough to contemplate. It should fill all lovers of

their country with very serious concern. We would still exist as a Church. We would still have a certain measure of liberty as a Church. We might still meet together as a Church, and try to manage many departments of duty. But we would be acting under coercion and compulsion; and if we did not choose to submit to coercion and compulsion—to submit to the Civil Court as a Court of Appeal—then so far under persecution. For it cannot be denied that to allow the Church to carry on her procedure under such risk as this, would be a limiting of the measure of toleration granted to that Church.

I would earnestly hope that this question, if revived, will be found to be, as the same question has always been found to be in Scotland, associated with manifest tokens of the divine presence, and the divine blessing on the Church. I daresay there are some—and I myself might be inclined to sympathize with them very much—who may regard the intrusion of this question at this crisis as peculiarly unseasonable. There may be those—and I would largely sympathize with them—who may grudge the attention of the Church being, as they think, distracted and drawn away from great spiritual awakenings, and their great duty in connection with such awakenings, to a struggle of this sort—a struggle apparently upon a point of law. Moderator, I would only, before I close, express a hope that all who might be inclined to cherish such a feeling will, before they indulge in it, make themselves acquainted with the past experience of their country. If they do, they will see that these two things have frequently gone together in the history of the Church of Scotland—a struggle for her independence, under her great and only Head, and a large outpouring of the Spirit of God. (Loud applause).

Mr. DUNLOP seconded the motion; and, in shortly addressing the Commission, expressed his cordial concurrence in all that had been said by Dr. Candlish.

Mr. WILSON also expressed his entire concurrence, and proposed the appointment of a large committee to diffuse information on the subject, and prepare the people for a coming struggle if necessary; Dr Begg, convener.

Both motions were unanimously adopted.



